BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

U.S. GEOTHERMAL, INC. AN IDAHO CORPORATION, **Complainant,** **vs.** **IDAHO POWER COMPANY, AN IDAHO CORPORATION,** **Respondent.**	**CASE NO. IPC-E-04-8**
BOB LEWANDOWSKI and MARK SCHROEDER, **Complainants,** **vs.** **IDAHO POWER COMPANY, AN IDAHO CORPORATION,** **Respondent.**	**CASE NO. IPC-E-04-10** **FINAL ORDER ON RECONSIDERATION** **ORDER NO. 29682**

On November 22, 2004, the Idaho Public Utilities Commission (Commission) issued final Order No. 29632 in two complaint proceedings against Idaho Power Company (Idaho Power; Company), Case Nos. IPC-E-04-8 and IPC-E-04-10.

The Complainants are small power producers and qualifying facilities (QFs) under the Public Utility Regulatory Policies Act of 1978 (PURPA) and the implementing regulations of the Federal Energy Regulatory Commission (FERC). The respondent, Idaho Power, an electric utility, is required pursuant to PURPA and the implementing rules and regulations of FERC and this Commission to purchase power from eligible QFs.

U.S. Geothermal, Inc. and Bob Lewandowski and Mark Schroeder alleged in their complaints that Idaho Power was proposing PURPA contract terms that were unjust, unreasonable and unlawful. Among the contract issues addressed by the Commission in its final

Order, the Commission provided specific guidance and direction with respect to the 10 MW threshold for posted rate eligibility and the 90%/110% performance band.

Regarding the 10 MW threshold, we stated:

> It is the Commission's belief that a legally enforceable obligation translates into reciprocal contractual obligations for both parties, a quid pro quo. It is not just a lock-in of avoided cost rates but is also an obligation to deliver. . . .
>
> We find that the 10 MW threshold limit, however, must have some import, some significance if eligibility is to mean anything. The Commission finds it reasonable to define firmness as predictability on a monthly basis. By way of eligibility criteria, we find it reasonable for the utility to make an initial capacity determination and require that the QF demonstrate that under normal or average design conditions the project will generate at no more than 10 aMW in any given month. To provide further definition and sideboards, we also find it reasonable to cap the maximum monthly generation that qualifies for published rates at the total number of hours in the month multiplied by 10 MW.

Regarding the 90%/110% performance band, we stated:

> As reflected in our 10 MW cap discussion, the Commission finds that a legally enforceable obligation translates into contractual obligations of both parties. For a QF it translates into an obligation or commitment to deliver its monthly estimated production. Idaho Power proposes that this delivery of committed energy fall within a 90/110 band. Staff proposes that the band be expanded to 80/120. We find 90/110 to be reasonable. The Commission recognizes that excess energy is not accepted by the Company without consequence. If unplanned for and not easily integrated the energy may as suggested by the Company have to be sold in the surplus market or other more economic resources of the Company backed down.
>
> The Commission finds that energy delivered in excess of 110% should be priced at 85% of the market or the contract price, whichever is less. As reflected in our discussion of 10 MW we find it reasonable to cap the maximum monthly generation that qualifies for published rates at the total number of hours in the month multiplied by 10 MW. This is also a cap for excess energy payments. By way of example, a QF that commits to deliver a monthly total of 7,000 kWh in January and delivers greater than 90% of the commitment amount that month will receive the posted rate for all energy up to 110% of the 7,000 kWh commitment amount and 85% of the Mid-C market price for energy exceeding 110% up to the 10 MW cap. The QF will receive no payment for any energy provided above the 10 MW cap.
>
> Idaho Power proposes that if the QF delivers less than 90% of the scheduled "net energy" amount (for reasons other than forced outage or forced majeure

> events) that the shortfall energy be priced at 85% of the market price, less the contract rate, the difference capped at 150% of contract rate. The Commission believes that such a shortfall energy pricing method might have the potential of exacting too heavy a price. We instead find it reasonable when the QF fails to deliver 90% of the monthly commitment amount to price all delivered energy at 85% of the market price, or the contract rate, whichever is less.

Timely Petitions for Reconsideration of Order No. 29632 were filed by the Complainants Bob Lewandowski and Mark Schroeder, and the following non-parties: Energy Vision LLC (Glenn Ikemoto); Renaissance Engineering & Design PLLC (Brian D. Jackson); West Slope Wind One LLC (LeRoy Jarolimek); Kurt Myers; Gerald Fleischman; Leslie Tidwell; and Gary Seifert. All petitioners for reconsideration are interested in PURPA QF development. Idaho Power and PacifiCorp filed Answers to the Petitions for Reconsideration. Energy Vision LLC filed a reply to the utility Answers.

That portion of the Commission's Order for which reconsideration is requested is the Commission's findings and decision regarding the 90/110 performance band and the payment structure for shortfall energy. The reconsideration petitions can be summarized as follows:

Lewandowski and Schroeder

Messrs. Lewandowski and Schroeder in their Petition note that Idaho Power's proposal regarding shortfall energy was that whenever a QF's production falls below 90% of the amount called for the QF would pay Idaho Power for the lost production. This shortfall energy price would be either the contract rate or the Mid-C price, whichever is higher, with the shortfall energy price capped at 150% of the contract rate. The Commission, Petitioners note, quickly observed that "such a shortfall energy pricing method might have the potential of exacting too heavy a price." Order No. 29632 p. 20. But the solution crafted by the Commission, Petitioners contend, is a solution that no party to the proceeding proposed or even addressed. The Commission's solution, they state, severely penalizes a QF even if production is only one-tenth of one percent below the 90 percent target. As the Commission pricing mechanism was proposed by no party to the case, Petitioners contend that it is not in conformity with law. Citing *Hayden Pines*, 111 Idaho 331, 335 (1986). The Commission's ruling in this regard, Petitioners contend, is unreasonable as renewable resources, such as hydro, solar and wind, are weather dependent for the source of their fuel. Further exacerbating the price uncertainties introduced by such a penalty, they contend, is the fact that there is no floor below which the rate could go.

Petitioners contend that no penalty should be based on market price. Rather than market price, they contend that any penalty should be based on a fixed scale of gradually decreasing rates that correspond to a QFs decreasing availability factor. Alternatively, the Petitioners suggest that the Commission could require that weather may be claimed as the event of force majeure.

Energy Vision LLC (Glenn Ikemoto)

Energy Vision (EnVision) contends that the Commission's ruling regarding the 90/110 band and pricing mechanism for shortfall energy is unreasonable and not in conformity with the PURPA requirement that states actively encourage the development of QF power in furtherance of the federal government's goal of promoting energy independence.

EnVision contends that the incentives are reversed in the shortfall energy remedy crafted by the Commission, i.e., when market prices are higher, the QF faces no penalty because it will receive published prices anyway – no incentive to forecast more accurately. Alternatively when market prices are lower, the QF faces a potentially severe penalty; however, this is exactly when ratepayers would prefer to reduce QF deliverables.

EnVision also contends that published rates do not account for all relevant risk considerations, i.e., (1) the forecast of gas prices do not consider the cost of achieving price certainty, (2) construction cost overruns and excess inflation are also not explicitly accounted for in the SAR, (3) regulatory risks are not accounted for, and (4) nor are the advantages of resource diversity taken into account. EnVision contends that utility planning and long-term risks far outweigh the operational risks addressed by the 90/110 band. If the Commission ignores the long term risk cited, it also seems reasonable, Petitioners contend, to ignore the much smaller operational risk of production variances.

The Commission, EnVision notes, correctly recognized that Idaho Power's proposed penalty could result in QFs delivering the bulk of their commitment and still owe the utility money. Unfortunately, EnVision contends that the Commission's approach which fixes the problem of wiping out revenues introduces uncapped market risk. This risk, it contends, makes projects unfinancable.

A classic measure of fairness, EnVision contends, is whether one party would take the deal being offered to another. In this case, EnVision contends that the production variance is nothing compared to price variance.

EnVision contends that the record in this case is inadequate for selecting a penalty linked solely to market prices. Petitioner contends that the fairest solution is to eliminate the 90/110 band. Alternative solutions suggested are (1) forecasting fees; (2) a published price penalty; and (3) an expansion of the force majeure. EnVision requests a hearing to explore the suggested alternatives.

Renaissance Engineering & Design PLLC (Brian Jackson)

Renaissance Engineering contends that its clients (farmers and ranchers) are installing state of the art equipment with a proven 98% availability and are typically improving the local power grid with capacitor banks and voltage regulation. The burden of forecasting monthly generation with a potential penalty so very high, it states, is too severe and restrictive. It is probably as difficult to predict energy prices into future years, it states, as it is to predict monthly wind generation.

Renaissance Engineering contends that there is no precedent or justification for differentiating between generation technologies or for paying less than published rates. To the extent that the Commission requires a PURPA QF to look and operate and act like a merchant power plant with a firm commitment of energy instead of a PURPA QF with a dedicated resource, the Petitioner contends that the plant should then be allowed to market excess energy, beyond its commitment to the Idaho utilities at market prices on the open market.

Renaissance Energy contends that the Commission is making complex something that was initially simple, clean and efficient.

Kurt Myers

Mr. Myers believes there is a mistake in the wording of one sentence of the Commission's Order. The sentence he states reads as follows: "We instead find it reasonable when the QF fails to deliver 90% of the monthly commitment amount to price all delivered energy at 85% of the market price, or the contract rate, whichever is less." This sentence, he states, appears to contradict the sentence before it that mentions that Idaho Power's shortfall proposal has the potential to "exact too heavy a price." The sentence which he believes is mistaken, he states, would prevent anyone from ever doing a PURPA project in Idaho.

Gerald Fleischman

Mr. Fleischman supports the Commission Order dissent of Marsha Smith. The Commission's decision, he contends, does not meet the intent of PURPA and builds another barrier to entry for small renewable energy projects. How can it make sense from a cost standpoint, he queries, for a QF developer to install backup generation? Further, he queries, what are the costs of not integrating wind. In the long run, he states, we need more diversification or power supply both from an energy resource perspective and from an ownership perspective. PURPA, he states, is the only law that provides a market for the smaller wind power producer.

West Slope Wind One LLC (LeRoy Jarolimek)

Mr. Jarolimek contends that the below 90% shortfall penalty has guaranteed that it will be nearly impossible for any renewable project like wind, geothermal, anaerobic digester or biomass using a PURPA contract to secure financing.

The 90/110 band, Petitioner states, forces QFs to reduce estimated production from the real potential production to fit within a very small window. The wind industry, he notes, states that monthly average energy production can vary as much as 24%. The Staff recommended 80/120 band, he states, would put wind very close to what is a normal variance of the monthly estimated projection.

Mr. Jarolimek contends that Idaho Power's shortfall option is fairer than the Commission's Order. The 90/110 band, he states, reduces a QF's ability to obtain fair market value for their energy and makes it difficult to develop a profitable wind project. If a QF misses monthly estimates by only one watt, it reduces the price for all monthly energy production.

Leslie Tidwell

Leslie Tidwell is an investor who before the Commission's Order was willing to invest in a 3 MW wind farm (LeRoy Jarolimek's Farm). The Commission's shortfall energy solution, Petitioner states, has caused Petitioner to cancel funding for the Jarolimek project. On a small wind project without economies of scale, the returns to the investor, Petitioner states, are barely average, even when using the avoided cost fee structure. Leslie Tidwell encourages the Commission to eliminate the shortfall pricing mechanism.

Gary Seifert

Mr. Seifert contends that the Commission's Order is punitive to the extent that it will eliminate all investment and financability of renewable wind projects in Idaho. The 85% of market wording, he contends, eliminates all access for wind projects that need any external investment. The uncertainty the Commission's ruling invokes, he states, must be removed if wind projects in Idaho are to obtain financing.

Idaho Power Answer

Idaho Power contends that PURPA requires that customers be economically indifferent to whether a utility serves its loads with QF resources, utility-owned power plants or utility purchases from the wholesale market. PURPA, it states, does not guarantee that all QF projects will be developed.

Idaho Power, the Company states, proposed a "shortfall energy" remedy that required QFs to pay Idaho Power liquidated damages when a QF failed to deliver 90% of the monthly contract commitment amount. Lewandowski and Schroeder recommended no remedy for failure to deliver the minimum energy. The Commission's Order, the Company states, did not adopt the exact recommendations of any of the parties. Instead the Commission, it states, adopted a remedy that occupies the middle ground between the Idaho Power/Staff shortfall energy remedy proposal and the Schroeder/Lewandowski no remedy position. The adopted market band pricing remedy, the Company states, is the same remedy currently included in the QF contract between Idaho Power and Tiber Montana LLC for the Tiber hydro project.

Petitioners argue, Idaho Power notes, that because the Commission did not adopt either the shortfall energy remedy or the no remedy position that the Commission is legally precluded from adopting the market based pricing remedy. The position advanced by Petitioners, characterized by Idaho Power as baseball arbitration, does not, it states, conform with Idaho law. Citing *Industrial Customers of Idaho Power v. Idaho Public Utilities Commission*, 134 Idaho 285, 293 (2000). The Court in the *Industrial Customers* case held that the Commission is not limited to simply selecting one of the alternatives presented. As the Court in the *Industrial Customers* noted, the Commission as finder of fact need not weigh and balance the evidence presented to it, but is free to accept certain evidence and disregard other evidence. Citing *Application of Utah Power & Light Company*, 107 Idaho 446, 451 (1984). Additionally the Court in *Industrial Customers* noted that the Commission is free to rely on its own expertise as justification for its decision. Citing *Boise Water Corp. v. Idaho Public Utilities Commission*, 97 Idaho 832, 842 (1976); *Intermountain Gas Company v. Idaho Public Utilities Commission*, 97 Idaho 113 (1975).

This case, Idaho Power contends, grew out of the Company's desire to obtain firm, reliable energy commitments from QFs. The availability factor proposed by Petitioners as an alternate, Idaho Power contends, only has meaning when it is applied to a generating facility that is dispatchable. It is not, the Company contends, a reasonable test for intermittent resources like wind.

PacifiCorp Answer

PacifiCorp contends that the 90/110 performance band adopted by the Commission is both reasonable and lawful. QFs seeking firm pricing are subject to a "legally enforceable obligation" to deliver energy and capacity in the contracted-for amount. For such an obligation to have meaning, PacifiCorp contends that there must be some consequences associated with the failure of QFs to deliver the contract amount within reasonable parameters.

It is the nature of the resource, PacifiCorp contends, and not the Commission's decision that puts intermittent and thermal resources on different footing. The Commission's decision, it states, treats all resources fairly by allowing the facility to determine the appropriate monthly commitment levels.

Avoided costs, PacifiCorp contends, include both capacity and energy components. A utility, it contends, cannot be said to avoid capacity cost if the QF is permitted to deliver or not at its sole discretion. Some measure of meaningful certainty, is required, PacifiCorp contends. Further, PacifiCorp notes that the Commission's Order recognizes that there are consequences to the utility associated with over- and under-deliveries.

The performance band, PacifiCorp contends, is a reasonable, flexible method of insuring that QFs live up to their delivery commitments. It allows QFs to receive firm pricing based on aggregate monthly delivery commitments. Over- and under-deliveries are netted on a monthly basis, rather than being imposed hourly or daily, and are further buffered by the 90/110 band. Additionally, PacifiCorp notes that QFs are permitted to periodically revise their monthly delivery commitment throughout the contract term, and are excused from delivery in the event of forced outages.

Contrary to Petitioners assertions, PacifiCorp contends that the performance band does not force QFs to limit or minimize their output. Rather, it merely limits firm, capacity benefits to the level at which the QF owner can reliably predict the monthly output of the facility. Non-firm pricing, it notes, is available for QFs who seek to deliver on an "as available" basis.

PacifiCorp further contends that the Commission's decision regarding the pricing for shortfall deliveries is supported by substantial and competent evidence. Idaho Power proposed that QFs falling below the performance band be required to pay an amount equal to 85% of the market price for the shortfall, capped at 150% of the contract price. The Commission adopted a less onerous solution by which all deliveries in a shortfall month are priced at 85% of the market price, or the contract price, whichever is less. Petitioners assertion that this finding is not supported by substantial evidence because it differs from any specific remedy proposed by any of the parties, PacifiCorp contends is without merit. Citing *Industrial Customers of Idaho Power v. Idaho Public Utilities Commission*, 134 Idaho 285, 293 (2000).

PacifiCorp contends that the speculative consequences of the performance band on financing options for QFs raised by Petitioners should have been presented at hearing. Similarly it notes that there is no foundation in the record for Renaissance's proposal that QFs be allowed to sell excess delivery amounts in the market.

Energy Vision LLC Reply

EnVision does not agree that a record has been adequately developed regarding using market prices for performance shortfalls. Envision contends the performance band is the new weapon of choice to impede renewables. Citing Idaho Power's most recent RFP, EnVision contends that there is insufficient information in the record to decide whether the financing barrier created by the performance mechanism is justified. The performance band, it states, is not an economic issue, as represented by the utilities. Rather, it states, it is a financing issue.

Commission Decision

The Commission has reviewed the filings of record in Case Nos. IPC-E-04-8 and IPC-E-04-10 including the underlying transcript and the Commission's Order No. 29632. We have also reviewed the Petitions for Reconsideration, the utility Answers and the Reply, and the Idaho case authorities cited therein. We have further reviewed our jurisdiction and authority under PURPA and the implementing regulations of FERC.

Having reviewed our Order and the underlying record we find our reasoning regarding the 90/110 performance band and shortfall pricing structure to be sound, in furtherance of the ends of PURPA and supported by the record. We find that Petitioners have failed to establish that the Commission decision is unreasonable, unlawful, erroneous or not in conformity with law. Commission Rule of Procedure 331.01. We find that the Commission has broad authority under PURPA to set the rates, terms and conditions of QF purchases and is not precluded from fashioning a remedy different from the specific alternatives proposed by the parties. 18 C.F.R. § 292.304; *Industrial Customers*, 134 Idaho 285, 293 (2000).

The harshness or inequity we foresaw in Idaho Power's proposed shortfall remedy was the very real possibility at month's end, with the combination of very low actual generation and very high market prices, of a QF being out-of-pocket and having to pay the utility for monthly contract energy shortfall amounts exceeding the calculated revenue for contract energy provided to the utility. Such a result, we find, continues to be possible even with the 150% cap proposed by the utility. We eliminated the possibility of such a result. Under our Order there is no instance in which a QF project could end up owing Idaho Power at the end of the month for energy not produced. Projects failing to produce at least 90% of their monthly energy commitments are paid non-firm energy rates (the same as Idaho Power's non-firm Schedule 86 rates) capped at the rate that would have otherwise been paid under the contract.

This Commission finds no compelling reason to convene further hearings to explore the new alternatives and proposals suggested for the first time on reconsideration. As indicated in our prior Order, the Commission will consider the reasonableness of any signed contract negotiated by and acceptable to the parties and their respective arguments as to the equity and fairness in approving same.

CONCLUSIONS OF LAW

The Idaho Public Utilities Commission has jurisdiction over Idaho Power Company, an electric utility, pursuant to the authority and power granted it under Title 61 of the Idaho Code and the Public Utility Regulatory Policies Act of 1978 (PURPA).

The Commission has authority under PURPA and the implementing regulations of the Federal Energy Regulatory Commission (FERC) to set avoided costs, to order electric utilities to enter into fixed term obligations for the purchase of energy from qualified facilities and to implement FERC rules.

ORDER

In consideration of the foregoing and as more particularly described above, IT IS HEREBY ORDERED and the Commission does hereby deny each and every one of the filed Petitions for Reconsideration of Order No. 29632 in Case Nos. IPC-E-04-8 and IPC-E-04-10.

THIS IS A FINAL ORDER DENYING RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case Nos. IPC-E-04-8 and IPC-E-04-10 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 10th day of January 2005.

Paul Kjellander

PAUL KJELLANDER, PRESIDENT

See Separate Dissent

MARSHA H. SMITH, COMMISSIONER

Dennis S. Hansen

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Jean D. Jewell

Jean D. Jewell
Commission Secretary

bls/O:IPCE0408_10_sw3

DISSENT OF
COMMISSIONER MARSHA H. SMITH
ORDER NO. 29682
CASE NOS. IPC-E-04-8 AND IPC-E-04-10

I continue to believe that the Commission erred in its decision in Order No. 29632 and I would grant the Petitions for Reconsideration and conduct further hearings for the purpose of developing further record and exploring the reasonableness of the Commission's decision approving the 90/110% performance band and a market based rate for surplus and shortfall energy.

Marsha H Smith
MARSHA H. SMITH, COMMISSIONER